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# Casenotes: Torts — Joint Tortfeasors — Accord and Satisfaction Executed by One Joint Tortfeasor Constitutes a Release of That Defendant from Further Liability but Not a Bar to the Plaintiff's Suit against the Unreleased Joint Tortfeasor nor to the Unreleased Joint Tortfeasor's Indemnity Claim against the Released Tortfeasor. *Loh v. Safeway Stores, Inc.*, 47 Md. App. 110, 422 A.2d 16 (1980)

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TORTS — JOINT TORTFEASORS — ACCORD AND SATISFACTION EXECUTED BY ONE JOINT TORTFEASOR CONSTITUTES A RELEASE OF THAT DEFENDANT FROM FURTHER LIABILITY BUT NOT A BAR TO THE PLAINTIFF'S SUIT AGAINST THE UNRELEASED JOINT TORTFEASOR NOR TO THE UNRELEASED JOINT TORTFEASOR'S INDEMNITY CLAIM AGAINST THE RELEASED TORTFEASOR. *Loh v. Safeway Stores, Inc.*, 47 Md. App. 110, 422 A.2d 16 (1980).

## I. INTRODUCTION

In *Loh v. Safeway Stores, Inc.*,<sup>1</sup> the Court of Special Appeals of Maryland held that an accord and satisfaction executed by one joint tortfeasor acted as a release of that defendant from all liability to the injured plaintiff.<sup>2</sup> Under Maryland law, a release of one joint tortfeasor does not prohibit a plaintiff from proceeding against other unreleased tortfeasors.<sup>3</sup> In dictum, however, the *Loh* court indicated that the plaintiff could not recover additional compensation beyond the amount previously tendered in the accord and satisfaction if the remaining, unreleased tortfeasor was entitled to indemnification from the released tortfeasor.<sup>4</sup> The *Loh* court reasoned that forcing the released tortfeasor to pay additional compensation would render the previously executed accord and satisfaction meaningless.<sup>5</sup>

This casenote examines the *Loh* decision and its ramifications on the Uniform Contribution Among Tortfeasors Act.<sup>6</sup> It concludes by advocating that Maryland adopt the doctrine of partial indemnification.<sup>7</sup>

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1. 47 Md. App. 110, 422 A.2d 16 (1980).

2. *Id.* at 127-29, 422 A.2d at 26-27.

3. MD. ANN. CODE art. 50, § 19 (1979). Section 19 is part of the Uniform Contribution Among Tortfeasors Act, codified at MD. ANN. CODE art. 50, §§ 16-24 (1979). Section 19 provides:

A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides; but reduces the claim against the other tort-feasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

*Id.*

4. 47 Md. App. 110, 130, 422 A.2d 16, 27-28 (1980).

5. *Id.* at 130, 422 A.2d at 28. The *Loh* court also held that the plaintiff's suit for breach of implied warranty was sufficiently similar to a "claim in tort" to allow the plaintiff to claim the role of an injured person for purposes of the Uniform Contribution Among Tortfeasors Act. *Id.* at 121, 422 A.2d at 23. This note does not address that aspect of the case.

6. MD. ANN. CODE art. 50, §§ 16-24 (1979).

7. Partial indemnification is a method of apportioning liability among joint tortfeasors when one joint tortfeasor seeks indemnity from another joint tortfeasor. Partial indemnification requires that each responsible joint tortfeasor be liable to the plaintiff in proportion to the tortfeasor's relative responsibility in causing the plaintiff's injury. *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 148-49, 282 N.E.2d 288, 292, 331 N.Y.S.2d 382, 387 (1972). See notes 63-66 and accompanying text *infra* for a further examination of the *Dole* decision.

## II. BACKGROUND

An accord and satisfaction is a method of discharging a disputed cause of action whereby the parties substitute an agreement in settlement of the claim and execute such substituted agreement.<sup>8</sup> The "accord" is the agreement and the "satisfaction" is the execution or performance of the accord.<sup>9</sup> Acceptance of an accord tendered in full payment of a disputed claim discharges the entire claim.<sup>10</sup>

Early Maryland case law held that acceptance of an accord and satisfaction tendered by one of a number of joint tortfeasors discharged the plaintiff's claim against all tortfeasors.<sup>11</sup> Maryland reasoned that the result of the accepted accord and satisfaction was a satisfaction of the plaintiff's entire claim.<sup>12</sup>

Other jurisdictions were in accord with Maryland concerning the effect of accepting an accord and satisfaction tendered by one joint tortfeasor, but utilized a different reasoning to reach this conclusion.<sup>13</sup> These jurisdictions held that an accord and satisfaction constituted a release of the settling defendant rather than a satisfaction.<sup>14</sup> A release, whether gratuitous or for consideration, occurs when a plaintiff agrees

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8. 1 M.L.E. *Accord and Satisfaction* § 1, at 36 (1960); see *Porter v. Berwyn Fuel & Feed Co.*, 244 Md. 629, 637, 244 A.2d 662, 666 (1966) (citing *Franklin Fire Ins. Co. v. Hamill*, 5 Md. 170, 186 (1853)).

9. *In re Trexler Co. of America*, 15 Del. Ch. 76, 132 A. 144 (1925); 1 M.L.E. *Accord and Satisfaction* § 1, at 36 (1960).

10. *Hodgson v. Phippin*, 159 Md. 97, 99-100, 150 A. 118, 119 (1930). An accord and satisfaction requires that the debt be unliquidated. If no amount is in dispute, there can be no accord and satisfaction because the creditor would not receive any consideration he is not already legally entitled to receive in return for his promise to discharge the original claim. *Eastover Co. v. All Metal Fabricators, Inc.*, 221 Md. 428, 433-34, 158 A.2d 89, 92 (1960); *Foakes v. Beer*, 9 App. Cas. 605, 617 (1884); *Pinnel's Case*, 77 Eng. Rep. 237, 237 (C.P. 1602). For a complete examination of the law concerning accord and satisfaction, see 6 A. CORBIN, CORBIN ON CONTRACTS §§ 1276-1292 (1962).

11. *Stockton v. Frey*, 4 Gill 406, 423-24 (Md. 1846). At early common law, joint tortfeasors were defined as two or more persons acting in concert to commit an intentional wrong. *Jackson, Joint Torts and Several Liability*, 17 TEX. L. REV. 399, 403 (1939); *Reath, Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176, 178 (1898); see *Sir John Heydon's Case*, 77 Eng. Rep. 1150 (1613).

12. *Trieschman v. Eaton*, 224 Md. 111, 116, 166 A.2d 892, 895 (1961) (citing *Stockton v. Frey*, 4 Gill 406, 412-13 (Md. 1846)). Since a satisfaction is, by definition, acceptance of full compensation for a claim, *Seither v. Philadelphia Traction Co.*, 125 Pa. 397, 402, 17 A. 338, 338 (1889), a plaintiff is limited to a single satisfaction even if the injury were caused by tortfeasors not acting in concert. See *Bell v. Allstate Ins. Co.*, 265 Md. 727, 291 A.2d 478 (1972); *Lanasa v. Beggs*, 159 Md. 311, 151 A. 21 (1930). The exception being if the injuries are separate and distinct, the plaintiff is entitled to full satisfaction as to each injury. *Kyte v. McMillion*, 256 Md. 85, 99, 259 A.2d 532, 539 (1969); *Huff v. Harbaugh*, 49 Md. App. 661, 671, 435 A.2d 108, 114, cert. denied, 292 Md. 135 (1981).

13. *E.g.*, *Ransom v. Farish*, 4 Cal. 386, 386 (1854); *Ruble v. Turner*, 12 Va. (2 Hen. & M.) 38, 44 (1808).

14. *Ransom v. Farish*, 4 Cal. 386, 386 (1854); *Ruble v. Turner*, 12 Va. (2 Hen. & M.) 38, 44 (1808).

to relinquish a claim against a defendant.<sup>15</sup> At common law there was but one cause of action in a joint tort;<sup>16</sup> therefore, a release to one of several tortfeasors released all the wrongdoers.<sup>17</sup> The rationale for this rule was that permitting the plaintiff to sue more than one tortfeasor would allegedly allow him more than full compensation for his injury.<sup>18</sup>

The preclusion of further recovery upon the release of one tortfeasor was severely criticized.<sup>19</sup> As a result of this criticism, every American jurisdiction either judicially or statutorily changed the common law rule to permit a plaintiff to release one joint tortfeasor without releasing all others.<sup>20</sup> Maryland has altered the common law rule concerning the release of tortfeasors by adopting the Uniform Contribu-

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15. *Melo v. National Fuse & Powder Co.*, 267 F. Supp. 611, 612 (D. Colo. 1967); *Witcomb v. National Exch. Bank*, 123 Md. 612, 616, 91 A. 689, 690 (1914).
  16. *Sir John Heydon's Case*, 77 Eng. Rep. 1150, 1151-52 (1613).
  17. *The Mayor of Salford v. Lever*, [1891] 1 Q.B. 168, 177; *Cocke v. Jenner*, 80 Eng. Rep. 214, 215 (K.B. 1614). Early American courts held that a release to one of several tortfeasors released all regardless of whether the tortfeasors were acting jointly or merely concurrently. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 49, at 301-02 (4th ed. 1971).
  18. *E.g.*, *Lovejoy v. Murray*, 70 U.S. (3 Wall.) 1 (1865); *Gunther v. Lee*, 45 Md. 60 (1876). But see W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 49, at 302 (4th ed. 1971) (explaining that suing more than one would not result in excessive compensation because the amount paid for the release must be credited to any judgment obtained against an unreleased tortfeasor); *accord*, MD. ANN. CODE art. 50, § 19 (1979).
  19. *E.g.*, Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 425 (1937); Wigmore, *Release to One Joint-Tortfeasor*, 17 ILL. L. REV. 563, 563-64 (1923). The rule was criticized because it discouraged settlement, *Black v. Martin*, 88 Mont. 256, 267, 292 P. 577, 580 (1930), disregarded the intent of the parties, *Dwy v. Connecticut Co.*, 89 Conn. 74, 96, 92 A. 883, 890 (1915), constituted a trap for laypersons ignorant of the law, W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 49, at 304 (4th ed. 1971), and was "anomalous in legal theory" because it discharged non-contributing wrongdoers, thus giving them "an advantage wholly inconsistent with the nature of their liability." *McKenna v. Austin*, 134 F.2d 659, 662 (D.C. Cir. 1943).
  20. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 49, at 302-03 (4th ed. 1971). Prosser writes that Washington and Virginia are the only states which still make it impossible to release one tortfeasor without releasing all. *Id.* Recent legislation in Virginia, however, enables a plaintiff to release one tortfeasor without releasing all. VA. CODE § 8.01-35.1 (Supp. 1981). Furthermore, Washington also allows a plaintiff to release one tortfeasor without releasing all provided the tortfeasors were not acting in concert. Compare *Christianson v. Fayette R. Plumb, Inc.*, 7 Wash. App. 309, 499 P.2d 72 (1972) (the release of one joint tortfeasor will not release the remaining tortfeasors if they did not act in concert) with *Callan v. O'Neil*, 20 Wash. App. 32, 578 P.2d 890 (1978) (the release of one joint tortfeasor will release all tortfeasors if they acted in concert).

Jurisdictions changing the rule concerning the release of tortfeasors through case law sometimes do so by allowing the releasor to reserve his rights against others, *e.g.*, *Fieser v. St. Francis Hosp. & School of Nursing, Inc.*, 212 Kan. 35, 510 P.2d 145 (1973), or, more commonly, by deeming a release a covenant not to sue. *E.g.*, *Southern Pac. Co. v. Raish*, 205 F.2d 389 (9th Cir. 1953); *Johnson v. Harnisch*, 259 Iowa 1090, 147 N.W.2d 11 (1966). The effect of the covenant not to

tion Among Tortfeasors Act (UCATA).<sup>21</sup> The UCATA provides that an injured party may release one joint tortfeasor without discharging other joint tortfeasors from liability.<sup>22</sup> The effect of the release is to reduce any judgment against the unreleased joint tortfeasors by the amount of consideration paid for the release or by the amount agreed upon in the release if that amount is greater than the consideration paid.<sup>23</sup>

In construing the UCATA, however, Maryland has held that a plaintiff's claim is discharged when liability has been adjudged against one of several joint tortfeasors and the judgment fully paid.<sup>24</sup> If the

sue is to continue the cause of action against anyone not a party to the agreement. *Pellett v. Sonotone Corp.*, 26 Cal. 2d 705, 711, 160 P.2d 783, 787 (1945).

Of the jurisdictions changing the rule through statute, five have enacted individual covenant not to sue or release laws which lessen the effect of the common law rule: California, CAL. CIV. PROC. CODE § 877 (West 1980); Michigan, MICH. COMP. LAWS ANN. § 600.2925(d) (Supp. 1981-1982); Missouri, MO. ANN. STAT. § 537.060 (Vernon 1953); Virginia, VA. CODE § 8.01-35.1 (Supp. 1981); and West Virginia, W. VA. CODE § 55-7-12 (1981). Six states have adopted the Model Joint Obligations Act which enables a plaintiff to release one joint tortfeasor while reserving the right to sue other joint tortfeasors: Hawaii, HAWAII REV. STAT. §§ 483-1 to -6 (1976); Maine, ME. REV. STAT. ANN. tit. 14, § 11-17 (1980); Nevada, NEV. REV. STAT. §§ 101.010 -.090 (1979); New York, N.Y. GEN. OBLIG. LAW §§ 15-101 to -109 (McKinney 1978); Utah, UTAH CODE ANN. §§ 15-4-1 to -7 (1953); and Wisconsin, WIS. STAT. ANN. §§ 113.01 -.11 (West 1974 & Supp. 1981-1982).

21. MD. ANN. CODE art. 50, §§ 16-24 (1979). Maryland adopted the Act in 1941. Act of June 1, 1941, ch. 344, §§ 21-29, 1941 Md. Laws 548 (codified at MD. ANN. CODE art. 50, §§ 16-24 (1979)). Maryland and eight other jurisdictions have adopted the 1939 version of the UCATA or statutes based thereon. The 1939 version is reprinted at 12 U.L.A. 57-59 (1975). For a list of these nine jurisdictions, see Comment, *The Covenant Not to Sue: Virginia's Effort to Bury the Common Law Rule Regarding the Release of Joint Tortfeasors*, 14 U. RICH. L. REV. 809, 814 n.24 (1980). Eleven jurisdictions have adopted the 1955 version of the UCATA or statutes based thereon. The 1955 version is reprinted at 12 U.L.A. 63-107 (1975). For a list of these eleven jurisdictions, see Comment, *The Covenant Not to Sue: Virginia's Effort to Bury the Common Law Rule Regarding the Release of Joint Tortfeasors*, 14 U. RICH. L. REV. 809, 815 n.28 (1980). Future references to the UCATA throughout this note will be to the 1939 version of that Act.
22. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4, 12 U.L.A. 57-58 (1975), codified in Maryland at MD. ANN. CODE art. 50, § 19 (1979). A general release by a plaintiff to all mankind, however, will operate to discharge all parties to the claim. *Stefan v. Chrysler Corp.*, 472 F. Supp. 262 (D. Md. 1979); *Peters v. Butler*, 253 Md. 7, 251 A.2d 600 (1969); *Pemrock, Inc. v. Essco Co.*, 252 Md. 374, 249 A.2d 711 (1969), unless the defendants are liable for distinct and separate injuries. *Kyte v. McMillion*, 256 Md. 85, 259 A.2d 532 (1969).
23. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4, 12 U.L.A. 57-58 (1975), codified in Maryland at MD. ANN. CODE art. 50, § 19 (1979). The UCATA also expanded the definition of joint tortfeasor to include "two or more persons jointly or severally liable in tort for the same injury to person or property." *Id.* § 16(a) (emphasis added). Therefore, the UCATA encompasses concurrent or successive tortfeasors as well as joint tortfeasors. *Trieschman v. Eaton*, 224 Md. 111, 115, 166 A.2d 892, 894 (1961).
24. See *Grantham v. Board of County Comm'rs*, 251 Md. 28, 37, 246 A.2d 548, 553 (1968). Examples of a fully satisfied judgment are a settlement agreement paid in

judgment is not fully satisfied, the plaintiff is free to pursue his claim against other joint tortfeasors.<sup>25</sup>

The UCATA also addresses the right of indemnity between joint tortfeasors.<sup>26</sup> Indemnity requires that the defendant primarily responsible for the plaintiff's loss bear the entire burden of the plaintiff's compensation.<sup>27</sup> The UCATA specifically provides that no right to indemnity under existing law shall be impaired.<sup>28</sup> Generally, in Maryland, tortfeasors acting in concert or equally at fault are not entitled to indemnity.<sup>29</sup> However, when the wrongful act of one tortfeasor results in a judgment against another, the latter may be indemnified.<sup>30</sup>

### III. FACTUAL BACKGROUND OF *LOH*

Mrs. Loh purchased a package of beef frankfurters which were

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full after an adverse judgment at trial but before a new trial commences, *id.*, and a consent judgment. *Bell v. Allstate Ins. Co.*, 265 Md. 727, 291 A.2d 478 (1972).

25. *Trieschman v. Eaton*, 224 Md. 111, 166 A.2d 892 (1961). In *Trieschman*, the court explained that an unpaid or partially paid judgment does not preclude further suit. *Id.* at 119, 166 A.2d at 896. Furthermore, an order of satisfaction entered by an auditor and master prior to trial does not bar further litigation. *Maryland Lumber Co. v. White*, 205 Md. 180, 200, 107 A.2d 73, 81 (1954).
26. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 6, 12 U.L.A. 58 (1975), codified in Maryland at MD. ANN. CODE art. 50, § 21 (1979).
27. *Park Circle Motor Co. v. Willis*, 201 Md. 109, 113, 94 A.2d 443, 446 (1953); *McFall v. Compagnie Maritime Belge*, 304 N.Y. 314, 328, 107 N.E.2d 463, 471 (1952).
28. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 6, 12 U.L.A. 58 (1975), codified in Maryland at MD. ANN. CODE art. 50, § 21 (1979).
29. *Baltimore & O.R.R. v. County Comm'rs*, 113 Md. 404, 414, 77 A. 930, 933 (1910); 12 M.L.E. *Indemnity* § 6, at 164-65 (1961).
30. *Blockston v. United States*, 278 F. Supp. 576, 584 (D. Md. 1968) (citing *Baltimore & O.R.R. v. County Comm'rs*, 113 Md. 404, 414, 77 A. 930, 933 (1910)). Most indemnity cases involve joint tortfeasors who had some sort of relationship prior to the tort which justifies the claim for indemnity. Examples of this prior relationship include a party seeking indemnification after being held responsible solely by operation of law, as when an employer is held liable for the torts of his employee, *Pennsylvania Treshermen & Farmers' Mut. Cas. Ins. Co. v. Travelers Ins. Co.*, 233 Md. 205, 215, 196 A.2d 76, 81 (1963), or an employer is held liable for the torts of an independent contractor. *Orient Overseas Line v. Globemaster Baltimore, Inc.*, 33 Md. App. 372, 394, 365 A.2d 325, 341 (1976), *cert. denied*, 279 Md. 684 (1977). The prior relationship may also exist when the indemnitee has incurred liability because of a breach of duty owed to him by the supplier of goods, *Gardenvillage Realty Corp. v. Russo*, 34 Md. App. 25, 40, 366 A.2d 101, 111 (1976), or may be the result of a contract providing for indemnification which was executed between the joint tortfeasors prior to the tort. *Crockett v. Crothers*, 264 Md. 222, 227-28, 285 A.2d 612, 615 (1972).

If a prior relationship exists, Maryland employs an active-passive analysis in determining whether to grant indemnity. *Gardenvillage Realty Corp. v. Russo*, 34 Md. App. 25, 40, 366 A.2d 101, 111 (1976). This means that as between an active tortfeasor and a tortfeasor whose liability is merely passive, the active wrongdoer should be responsible for compensating the plaintiff's entire loss. *Id.* In *Park Circle Motor Co. v. Willis*, 201 Md. 109, 113, 94 A.2d 443, 446 (1953), the court indicated in dictum that a similar analysis, *i.e.*, comparing primary versus secondary liability, may also be utilized in deciding whether to grant indemnity. *Id.*

produced by Garden State Kosher Provisions (Garden State) and distributed to a Safeway store.<sup>31</sup> While biting one of the franks, Mrs. Loh broke a tooth on a foreign substance in the frank.<sup>32</sup> Garden State's insurance carrier was notified, and the insurer tendered a \$1,000 check to Mrs. Loh's attorney as "full payment of Mrs. Loh's claim."<sup>33</sup> Her counsel deposited the check on her behalf but notified the insurer that the check would not constitute full settlement for his client's injuries.<sup>34</sup>

Mrs. Loh filed suit against Safeway for breach of implied warranty.<sup>35</sup> Safeway then filed a third party claim against Garden State demanding indemnification.<sup>36</sup> Both defendants moved for summary judgment.<sup>37</sup> The trial court granted both motions, reasoning that acceptance of the check was an accord and satisfaction which represented full satisfaction of Mrs. Loh's claim.<sup>38</sup> Mrs. Loh appealed to the Court of Special Appeals of Maryland.

#### IV. THE COURT'S HOLDING

The court of special appeals held that Mrs. Loh's deposit of Garden State's check was an accord and satisfaction.<sup>39</sup> The *Loh* court then faced the issue of whether the settlement with Garden State constituted a full satisfaction of Mrs. Loh's claim, thereby barring further suit, or merely a release of Garden State, thereby enabling Mrs. Loh to pro-

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31. *Loh v. Safeway Stores, Inc.*, 47 Md. App. 110, 112, 422 A.2d 16, 18 (1980).

32. *Id.*

33. *Id.*

34. *Id.* at 112-13, 422 A.2d at 18. In his letter to Garden State, Mrs. Loh's attorney stated, "[W]e must advise you that we do not consider the \$1,000 payment to be in full settlement of Mrs. Loh's claim." *Id.* at 112, 422 A.2d at 18.

35. *Id.* at 113, 422 A.2d at 18. Mrs. Loh's suit alleged both breach of warranties of merchantability, MD. COM. LAW CODE ANN. § 2-314 (1975), and fitness for a particular purpose, *id.* § 2-315. 47 Md. App. 110, 113, 422 A.2d 16, 18 (1980).

36. 47 Md. App. 110, 113, 422 A.2d 16, 19 (1980). Safeway's third party claim was stated in two counts. First, Safeway demanded indemnification from Garden State because the product was manufactured by Garden State and impliedly fit for consumption. Second, Safeway alleged it was the negligence of Garden State which caused the injury. *Id.*

37. *Id.* at 114, 422 A.2d at 19. Garden State's motion for summary judgment argued that acceptance of the \$1,000 check represented a full accord and satisfaction to any liability Garden State owed Mrs. Loh. Safeway's motion asserted that Mrs. Loh "is entitled to but one satisfaction of her claim and cannot after collecting money in settlement of a claim against one person allegedly responsible then, with impunity, proceed by Court action against another." *Id.* Mrs. Loh opposed the summary judgment motions on the grounds that under art. 50, § 19 of the Maryland Annotated Code, a release of one joint tortfeasor does not release all. *Id.* at 116, 422 A.2d at 20.

38. *Id.* at 114-15, 422 A.2d at 19. The trial judge indicated that allowing Mrs. Loh to proceed against Safeway might result in double recovery. *Id.* Double recovery would not have resulted from suit against Safeway, however, because any judgment against Safeway would have been reduced by the amount of consideration paid by Garden State for the release. *See* MD. ANN. CODE art. 50, § 19 (1979).

39. 47 Md. App. 110, 116, 422 A.2d 16, 20 (1980).

ceed against the unreleased tortfeasor, Safeway.<sup>40</sup> Prior to *Loh*, no Maryland appellate court had considered the effect of an accord and satisfaction under the UCATA.<sup>41</sup>

In light of prior Maryland cases concerning joint tortfeasors and the difference between a release and a satisfaction,<sup>42</sup> the *Loh* court reasoned that the accord and satisfaction more closely resembled a release of Garden State, rather than a satisfaction of Mrs. Loh's claim, because there had been no determination of fault on the part of any wrongdoer.<sup>43</sup> Since the accord and satisfaction represented only a release, Safeway was not entitled to summary judgment.<sup>44</sup> Furthermore, while the release of Garden State absolved that defendant from further liability,<sup>45</sup> the *Loh* court held that Garden State was not entitled to summary judgment because its fault had to be determined for purposes of the indemnity claim Safeway had filed.<sup>46</sup>

In dictum, the *Loh* court indicated that Mrs. Loh could receive only the amount previously tendered by Garden State if Safeway was entitled to indemnity.<sup>47</sup> The *Loh* court reasoned that allowing Mrs. Loh to obtain additional compensation would deprive Garden State of the accord and satisfaction executed earlier.<sup>48</sup>

## V. EVALUATION

After the court of special appeals rendered its opinion, the case was continued in the trial court. The trial court granted Safeway's indemnity claim against Garden State.<sup>49</sup> Therefore, Mrs. Loh's deposit of Garden State's check in effect resulted in a release of both Garden

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40. *Id.* at 126, 422 A.2d at 25.

41. This author's research has found no reported opinion to date from any jurisdiction considering the effect of an accord and satisfaction under the UCATA.

42. The court of special appeals seemed most influenced by *Grantham v. Board of County Comm'rs*, 251 Md. 28, 246 A.2d 548 (1968). The *Grantham* court held that a settlement agreement fully paid by one joint tortfeasor after that defendant received an adverse judgment at trial but prior to a new trial represented full satisfaction of the plaintiff's claim. *Id.* at 38-39, 246 A.2d at 553-54. The court in *Grantham*, however, was careful to distinguish its facts from an earlier Maryland case which held that an order of satisfaction entered against one joint tortfeasor prior to any judgment was merely a release of that wrongdoer. *Id.* at 38-39, 246 A.2d at 554 (discussing *Maryland Lumber Co. v. White*, 205 Md. 180, 107 A.2d 73 (1954)). The *Grantham* court's care in differentiating itself from a pre-judgment satisfaction indicated to the *Loh* court that the crucial point in distinguishing a full satisfaction from a release was the rendering and full payment of a judgment. *Loh v. Safeway Stores, Inc.*, 47 Md. App. 110, 127, 422 A.2d 16, 26 (1980).

43. 47 Md. App. 110, 127, 422 A.2d 16, 26 (1980).

44. *Id.*

45. *Id.* at 129, 422 A.2d at 27.

46. *Id.* at 128, 422 A.2d at 27.

47. *Id.* at 130, 422 A.2d at 27-28.

48. *Id.* at 130, 422 A.2d at 28.

49. *Loh v. Safeway Stores, Inc.*, D. 1989 (Anne Arundel Co. Cir. Ct., Md. Mar. 2, 1981).



State and Safeway.<sup>50</sup> However, the release of one joint tortfeasor effectuating the release of all is one of the results the UCATA is designed to avoid.<sup>51</sup>

The dictum in *Loh* abrogates one of the reasons for adopting the UCATA, *i.e.*, the desire to encourage settlement.<sup>52</sup> Due to *Loh*, Maryland discourages a plaintiff from settling with a joint tortfeasor who might have to indemnify the remaining tortfeasors because such a settlement would deny the plaintiff any additional compensation.<sup>53</sup> A plaintiff in a *Loh* situation now faces the same choice an injured party did at common law. He must either accept the tender and relinquish his entire claim without full remuneration or reject the tender<sup>54</sup> and proceed to trial.

The problem illustrated by *Loh* is one in which a result fair to all parties cannot be achieved under current Maryland law. This is due to the two ways joint tortfeasors may apportion a judgment among themselves: pro rata contribution<sup>55</sup> or indemnity.<sup>56</sup> Since Safeway was enti-

50. Maryland follows the traditional common law doctrine that a protest does not prevent an accord from being satisfied. *Hodgson v. Phippin*, 159 Md. 97, 99-100, 150 A. 118, 119 (1930) (citing *Scheffenacker v. Hoopes*, 113 Md. 111, 117, 77 A. 130, 133 (1910)). Some courts have held, however, that the common law rule has been changed by section 1-207 of the Uniform Commercial Code and a protest will preserve the plaintiff's rights against the tendering party. *E.g.*, *Kroulee Corp. v. A. Klein & Co.*, 103 Misc. 2d 441, 426 N.Y.S.2d 206 (1980); *Scholl v. Tallman*, 247 N.W.2d 490 (S.D. 1976) (dictum). Maryland has not interpreted the effect of section 1-207.

Counsel for Mrs. Loh informed Garden State the check did not represent full settlement of her claim. Therefore, it would appear counsel could have argued that his protest preserved Mrs. Loh's right to pursue an action against Garden State under section 1-207 of the Uniform Commercial Code. For an examination of most of the cases and articles interpreting section 1-207 of the Uniform Commercial Code, see *Chancellor, Inc. v. Hamilton Appliance Co.*, 175 N.J. Super. 345, 418 A.2d 1326 (1980).

51. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4, 12 U.L.A. 57-58 (1975), codified in Maryland at MD. ANN. CODE art. 50, § 19 (1979).

52. *Lahocki v. Contee Sand & Gravel Co.*, 41 Md. App. 579, 620, 398 A.2d 490, 513 (1979), *rev'd on other grounds sub nom.* *General Motors Corp. v. Lahocki*, 286 Md. 714, 410 A.2d 1039 (1980).

53. Throughout this evaluation, it is assumed that the amount of the settlement is less than the full value of the plaintiff's claim. If the settlement figure fully compensates the plaintiff for his injuries, settlement prior to trial is not discouraged and there would be nothing unfair about denying the plaintiff additional compensation from unreleased tortfeasors.

54. The plaintiff should clearly reject the tender because some jurisdictions have held that merely keeping the check for an unreasonable period of time without cashing it is the equivalent of acceptance of the accord and satisfaction. *Annot.*, 13 A.L.R.2d 736 (1950) and cases collected therein. Maryland has not addressed this issue.

55. MD. ANN. CODE art. 50, § 17 (1979). This statute provides for a right to pro rata contribution among joint tortfeasors. *Id.* While "pro rata" is not defined by statute, it has been described as meaning "that the burden is distributed among joint tortfeasors in numerical shares . . . based on actual number of tortfeasors, . . . for example, 50% each as to two, or 33 1/3% each as to three tortfeasors." *Allen, Joint Tortfeasors: Contribution, Indemnity and Procedure*, *The Daily Rec. (Balti-*

tled to indemnity, Mrs. Loh could not collect any additional payment even if she had obtained a judgment against Safeway.<sup>57</sup> On the other hand, if Safeway were denied indemnity, it could seek contribution from Garden State to reduce its liability to Mrs. Loh.<sup>58</sup> If the claim for contribution were granted, Garden State would not be forced to pay any additional compensation,<sup>59</sup> but Safeway would be liable for only one half the total amount of the judgment.<sup>60</sup> Paying one half the judgment, however, represents a percentage of liability greater than Safeway's actual degree of fault in causing the injury.<sup>61</sup> Therefore, the unfairness results from the alternatives of denying the plaintiff an opportunity for full compensation of her injury or imposing liability on Safeway beyond its fault.<sup>62</sup>

The inequities of the *Loh* decision could be ameliorated by adopting a theory of partial indemnification as New York did in *Dole v. Dow Chemical Co.*<sup>63</sup> In *Dole*, the plaintiff brought an action against one

more), June 7, 1948, at 4, col. 1; *accord*, *Swigert v. Welk*, 213 Md. 613, 619, 133 A.2d 428, 431 (1957); *cf.* *Lahocki v. Contee Sand & Gravel Co.*, 41 Md. App. 579, 621, 398 A.2d 490, 514 (1979) (criticizing but, nevertheless, upholding this definition of pro rata), *rev'd on other grounds sub nom.* *General Motors Corp. v. Lahocki*, 286 Md. 714, 410 A.2d 1039 (1980).

56. MD. ANN. CODE art. 50, § 21 (1979). For an examination of the law concerning indemnity, see notes 26-30 and accompanying text *supra*.

57. 47 Md. App. 110, 130, 422 A.2d 16, 27-28 (1980).

58. MD. ANN. CODE art. 50, § 20 (1979). Under section 20, the release of Garden State would not prevent Safeway from pursuing a claim for contribution. Although Safeway's original third party claim sought only indemnity, 47 Md. App. 110, 130 n.25, 422 A.2d 16, 27 n.25 (1980), if that request were denied, Safeway could amend its plea to seek contribution. *See* MD. R.P. 320(c).

59. *Loh v. Safeway Stores, Inc.*, 47 Md. App. 110, 129, 422 A.2d 16, 27 (1980). The acceptance of the accord and satisfaction allowed Garden State to rest assured its liability would not exceed \$1,000. *Id.* *Accord*, *Swigert v. Welk*, 213 Md. 613, 619, 133 A.2d 428, 431 (1957).

60. For an example of how a judgment would be apportioned through contribution in a *Loh* situation, see *Swigert v. Welk*, 213 Md. 613, 619, 133 A.2d 428, 431 (1957).

61. See note 67 *infra* (discussing Safeway's liability in causing Mrs. Loh's injury). Some observers may feel that the contribution alternative is also unfair to a plaintiff like Mrs. Loh. It is true that if a judgment were obtained against Safeway for an amount in excess of \$2,000, Mrs. Loh would be denied the full amount of that judgment because Safeway would only have to pay one half the amount, *see* *Swigert v. Welk*, 213 Md. 613, 619, 133 A.2d 428, 431 (1957), and Garden State would not be liable for anything beyond the previously tendered \$1,000. *Loh v. Safeway Stores, Inc.*, 47 Md. App. 110, 129, 422 A.2d 16, 27 (1980); *accord*, *Swigert v. Welk*, 213 Md. 613, 619, 133 A.2d 428, 431 (1957). Forcing Garden State to pay any additional compensation, however, denies that defendant the benefit of its accord and satisfaction. *Loh v. Safeway Stores, Inc.*, 47 Md. App. 110, 129, 422 A.2d 16, 27 (1980).

62. Another possibility is having the court reduce any judgment against Safeway by the amount of consideration paid for the release. MD. ANN. CODE art. 50, § 19 (1979); *see* *Brooks v. Daley*, 242 Md. 185, 218 A.2d 184 (1966). This alternative would also result in liability beyond Safeway's actual degree of fault. *See* note 67 *infra* (discussing Safeway's liability in causing Mrs. Loh's injury).

63. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

joint tortfeasor.<sup>64</sup> That defendant filed a third party claim for indemnity against another joint tortfeasor. The court held that each responsible party should be liable to the plaintiff in proportion to his relative responsibility in causing the injury.<sup>65</sup> Therefore, the *Dole* court created an alternative, in appropriate cases, to full indemnification. That alternative was partial indemnification, which provides that each tortfeasor remunerate the plaintiff in accordance with that tortfeasor's actual fault.<sup>66</sup>

If Maryland were to adopt the doctrine of partial indemnification, most of the legal anomalies *Loh* illustrated would be alleviated.<sup>67</sup> A plaintiff would no longer be discouraged from settling with one tortfeasor prior to trial because the plaintiff could still recover whatever portion of his injury is attributable to the unreleased tortfeasors.<sup>68</sup> Nor would the result be that of either denying a plaintiff adequate compen-

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64. *Id.* at 145, 282 N.E.2d at 290, 331 N.Y.S.2d at 385. In *Dole*, the plaintiff's decedent was killed by exposure to a poisonous chemical while working for his employer, Urban. *Id.* at 146, 282 N.E.2d at 290, 331 N.Y.S.2d at 385. The administratrix brought suit against the manufacturer of the poison, Dow Chemical Co., for not providing the decedent with a personal warning. Dow filed a third party claim for indemnity against Urban, alleging Urban was primarily negligent in failing to comply with Dow's instructions accompanying the poison. *Id.*

65. *Id.* at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387. Significantly, while *Dole* involved a claim in negligence, the doctrine of partial indemnification has been extended to claims for breach of warranty of fitness for a particular purpose, *Coons v. Washington Mirror Works, Inc.*, 344 F. Supp. 653 (S.D.N.Y. 1972), *modified*, 477 F.2d 864 (2d Cir. 1973); *Noble v. Desco Shoe Corp.*, 41 A.D. 2d 908, 343 N.Y.S.2d 134 (1973), and implied warranty of merchantability. *Walsh v. Ford Motor Co.*, 70 Misc. 2d 1031, 335 N.Y.S.2d 110 (1972).

66. An illustration of how the *Dole* principle operates is provided in *Walsh v. Ford Motor Co.*, 70 Misc. 2d 1031, 335 N.Y.S.2d 110 (1972). In *Walsh*, the plaintiff sued both an automobile dealer and the manufacturer for a defective carburetor. *Id.* at 1031, 335 N.Y.S.2d at 112. The *Walsh* court found that while the manufacturer was primarily liable, the dealer also had a duty to inspect the defective item. *Id.* at 1032, 335 N.Y.S.2d at 112. His failure to do so resulted in the dealer's being 25% responsible for the problem and, correspondingly, liable for one fourth of the judgment. *Id.* at 1033, 335 N.Y.S.2d at 113.

67. Partial indemnification would not have aided Mrs. Loh, however, because her case is an example in which, to paraphrase *Dole*, the facts warrant what Safeway was seeking, *i.e.*, a traditional full indemnification. *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 147, 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 386 (1972). Safeway was in no way responsible for the plaintiff's injury and could not even be accused of negligence since it was not reasonably expected to break open each package of frankfurters and inspect the contents. *See Kratz v. American Stores Co.*, 359 Pa. 335, 59 A.2d 138 (1948); 2A L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 18.03[1][a] (1981) and cases collected therein. However, in a situation in which the plaintiff settles with a joint tortfeasor who is primarily but not totally at fault in causing the injury, partial indemnification would enable a plaintiff to seek additional compensation by pursuing an action against the unreleased tortfeasors for an amount equal to their proportion of fault in causing the injury.

68. For an example of how *Loh* would be resolved under partial indemnification, see *Bartels v. City of Williston*, 276 N.W.2d 113 (N.D. 1979). *Bartels* involved a comparative negligence jurisdiction, but the results would be the same for purposes of distributing liability if North Dakota had adopted only partial indemnification.

sation for his injuries or forcing a defendant to pay a percentage of the judgment greater than that defendant's actual degree of fault.

Furthermore, adopting partial indemnification would be no more foreign to Maryland than it was to New York. Prior to *Dole*, New York law allowed only strict pro rata contribution,<sup>69</sup> determined indemnity by an active-passive analysis,<sup>70</sup> and refused to adopt comparative negligence.<sup>71</sup> Current Maryland law is the same.<sup>72</sup> None of these factors, however, prevented the *Dole* court from concluding that there should be an apportionment of responsibility between joint tortfeasors in relation to their comparative fault.<sup>73</sup>

## VI. CONCLUSION

By indicating in dictum that a plaintiff may not receive additional compensation if the unreleased joint tortfeasor is entitled to indemnity from the released tortfeasor, *Loh v. Safeway Stores, Inc.*<sup>74</sup> results in a return to the common law rule that a release of one joint tortfeasor releases all. The effect of the dictum is to abrogate a specific reason for adopting the UCATA by discouraging plaintiffs from settling with joint tortfeasors. While this result seems harsh, an examination of Maryland law reveals no alternative resolution which adjudicates fairly to all parties in a situation like *Loh*. An adoption of partial indemnification, however, would ameliorate the problem by enabling a plaintiff to pur-

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69. N.Y. CIV. PRAC. LAW § 1402 (McKinney 1962) (repealed by Act of Sept. 1, 1974, ch. 742, § 1402, 1974 N.Y. Laws 1153).

70. See *Colon v. Board of Educ.*, 11 N.Y.2d 446, 451, 184 N.E.2d 294, 298, 230 N.Y.S.2d 697, 702 (1962). For an explanation of the active-passive analysis, see note 30 *supra*.

71. *Condon v. Epstein*, 8 Misc. 2d 674, 677, 168 N.Y.S.2d 189, 191 (1957). Had New York employed comparative negligence at the time of *Dole*, partial indemnification would represent a less radical departure from prior law because, as some commentators have suggested, partial indemnification (which has been referred to as comparative contribution) is just a type of comparative negligence. Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85, 95-97 (1974); accord, *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 583, 578 P.2d 899, 902, 146 Cal. Rptr. 182, 185 (1978). Currently, New York is a comparative negligence jurisdiction, having adopted such a concept in 1975, three years after the *Dole* decision. Act of Sept. 1, 1975, ch. 69, § 1411, 1975 N.Y. Laws 94 (codified at N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976)).

72. MD. ANN. CODE art. 50, § 17(b) (1979) (pro rata contribution); *Gardenvillage Realty Corp. v. Russo*, 34 Md. App. 25, 40, 366 A.2d 101, 111 (1976) (active-passive analysis of indemnity). Maryland does not follow a doctrine of comparative negligence, but there were efforts in the 1980 and the 1982 General Assembly to adopt such a concept. S. 1007, Md. Gen. Assembly, 1982 Sess.; H. 1484, Md. Gen. Assembly, 1980 Sess. Neither bill was enacted into law.

73. *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 149, 282 N.E.2d 288, 292, 331 N.Y.S.2d 382, 387 (1972).

74. 47 Md. App. 110, 422 A.2d 16 (1980).

sue an action against the unreleased joint tortfeasor for that defendant's proportionate responsibility in causing the injury.

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